Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	**CC Docket No. 01-318**
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	**CC Docket No. 98-56**
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	**CC Docket No. 98-147**
	)	
Petition of Association of Local Telecommunications Services for Declaratory Ruling	)	**CC Docket Nos. 98-147, 96-98, 98-141**

COMMENTS OF TDS METROCOM, INC., USLINK, Inc., and MADISON RIVER COMMUNICATIONS

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SUMMARY

The FCC should adopt a set of baseline performance standards and measurements for the provision of UNEs from ILECs to CLECs. To be effective, these standards must be directly linked to self-effectuating, meaningful penalties and damages to compensate CLECs for ILEC failures. In order to change the conduct of many ILECs that have an economic incentive to impose barriers to competition, the Commission's penalties and the damages provisions must not be such that they simply become a cost of doing business to an ILEC.

In adopting these standards, the Commission should expressly recognize the continued right of individual ILECs and CLECs to negotiate standards under Section 252. The Commission should leave to the states the development of standards in those circumstances where the ILEC is a small or rural ILEC or serves an aggregate of less than two percent (2%) of all access lines nationwide. Many states have already spent extensive time and resources developing standards. The FCC must make clear that its national standards are in no way intended to replace the state standards, as long as the state standards meet the minimum standards set by the FCC.

Specific standards, measurements, and remedies can only operate if all parties understand the rules relating to the ILECs' obligations to provide UNEs to CLECs. To the extent those rules are not clear, the Commission must address those concerns. In this regard, it is essential that the Commission make clear that the ILECs " no facilities gambit," as well as other practices that have the effect of denying CLECs' access to UNEs, violate Commission rules, and that a failure to provision, based upon such gambits, will be counted as failures in assessing damages and penalties for failure to meet the standards.

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COMMENTS OF TDS METROCOM, INC., USLINK, Inc., and MADISON RIVER COMMUNICATIONS

TDS METROCOM, Inc., USLINK, Inc., and Madison River Communications (the "3CLECs"), by their undersigned attorneys, submit these comments in response to the Commission's Notice of Proposed Rulemaking concerning the establishment of Performance Measurements and Standards for Unbundled Network Elements and Interconnection Trunks.[1]

TDS METROCOM and USLINK are facilities-based CLECs, serving residential and business customers in small- to medium-sized markets in Illinois, Michigan, Minnesota, and Wisconsin. Madison River Communications is an ILEC providing local exchange services in rural markets in Illinois, Alabama, Georgia, and North Carolina and CLEC services adjacent to its incumbent local exchange territories and in markets in North Carolina, Illinois, Louisiana, and

[1] *Performance Measures and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, FCC 01-331, Notice of Proposed Rulemaking, at ¶ 1 (rel. Nov. 19, 2001) ("*Metrics NPRM*")

Mississippi ("Madison River"). The NPRM seeks comments on the need for and desirability of establishing federal performance standards and measurements for the provision, maintenance, and repair of UNEs and interconnection trunks (collectively "UNEs") the nature of those standards and measurements, and the way in which such standards would be enforced. These standards would be applied to ILECs in connection with their provisioning, maintenance, and repair of facilities that are used by CLECs to compete for end-user customers. There is no question that meaningful, clear, and specific standards are essential if the benefits of competition envisioned in the 1996 Act[2] are to be realized. The history of the relations between many ILECs and CLECs during the past six years underscores the need for such standards, as well as the need for meaningful, effective, self-effectuating remedies to be applied in those instances in which an ILEC fails to meet the standards.

I. INTRODUCTION

Under the Act, ILECs are required to make UNEs available to CLECs.[3] While the Commission has, in the past, and is, presently, engaged in an effort to identify which portion of the incumbents networks must be unbundled,[4] the Commission, outside of the Section 271 process and in the context of RBOC mergers, has not previously addressed specific metrics to be used in determining whether the ILECs, in providing the defined UNEs have done so in a

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2 The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

3 *See* 47 U.S.C. 251(c)(3).

4 *See generally, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC, 117 F3d 1068 (8th Cir. 1997) (CompTel v. FCC) and Iowa Utils. Bd. v. FCC, 120 F3d 753 (8th Cir. 1997) (Iowa Utils. Bd. v. FCC), aff'd in part and remanded, AT&T v. Iowa Utils. Bd., 119 S Ct 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996*), Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460 (1997); *See* Comments Sought on the Commission's Triennial Review of the Section 251 Unbundling of Incumbent Local Exchange Carriers, *Public Notice*, CC Docket Nos. 01-338, 96-98, and 98-147, DA 01-2419 (rel. Jan. 15, 2002).

manner which accomplishes or supports the Act's goal of opening the local telecommunications market to competition.

As will be discussed below, many ILECs have performed in ways which make the provision of UNEs to CLECs basically a meaningless act. For instance, UNEs and other circuits critical to CLEC interconnection are provided too late or too early. Order completions and site/premise visits are gamed to disguise order non-completion, or orders are not fulfilled when promised. CLEC customers' services are inexplicably disconnected or disrupted. Once interrupted, service restoral requires excessive amounts of time just to contact the proper ILEC person and, then, lengthy repairs further inconveniencing the customer, costing both the customer and the CLEC goodwill and lost business. Some ILECs develop a myriad of reasons (substituting themselves for the regulator in some instances) why they cannot or need not provide the UNEs, either by conveniently claiming that some circuits are not UNEs or that they are not obligated to provide them. Such conduct has the direct affect of undermining the CLECs' ability to compete and damages the CLECs' reputation, often beyond repair.

Because of the CLECs' dependency on UNEs, ILECs, by providing unacceptable service through repeated service interruptions/disruptions, poor response, and lethargic repairs, have the power to undermine and seriously damage the CLECs' ability to compete. As monopoly providers, ILECs have a clear economic incentive to inhibit and destroy a new entrant's ability to compete in order to preserve their ability to charge monopoly rates and keep intact their firm grasp on local service. Accordingly, the consequences of the ILECs' failure to meet any adopted performance standards and measurements must result in meaningful economic consequences to the ILECs so that the payment of fines, damages, forfeitures, etc. does not simply become a cost of doing business for the ILEC.

II. BASELINE PERFORMANCE STANDARDS ARE NECESSARY AND CAN BE USED IN CASES WHERE STATES HAVE YET TO ACT

As the Commission has recognized in the absence of baseline performance standards and remedies, numerous states have undertaken extensive proceedings in an effort to develop standards and remedies that seek to require ILECs to make UNEs available to CLECs in ways which would allow the development of competition.[5] Many other states are far along in the process of developing standards, while a few have yet to do so. As with other aspects of the Act, the establishment of baseline standards and remedies by the FCC will have the benefit of filling in those gaps resulting from the fact that some states have not yet acted and setting clearer expectations for minimum acceptable behavior.

Because of the variety of ILEC networks, technology, and circumstances, a single set of standards will not be adequate. It would be an injustice to state commissions who devoted countless amounts of energy and resources to the establishment of state performance plans to ignore their expertise through a wholesale preemption of state plans, and would be inconsistent with the role the Act assigns to the states[6] which the Commission has long recognized. Nonetheless, a baseline of requirements and remedies could greatly assist states as they develop and modify their standards. These baseline standards and remedies can be readily adjusted by the states to conform to the particular circumstances that exist in each state. With the creation of baseline standards, no state would have to start from scratch in developing standards and remedies and every state would have at least a minimum set of standards.

In establishing baseline standards, the FCC must, however, be careful not to lose its focus in a plethora of numbers. Performance standards and measurements are of little use if the

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5 *See Metrics N* P*RM*, *supra* note 1, at ¶ 17.

6 *See, e.g.,* 47 U.S.C. §§ 253(b), 252(e)(3), and 251(d)(3).

requirements relating to the provision of UNEs and other interconnection services are not clear. For example, if there is a performance metric to track loop provisioning specifically for EELs (and there should be), it must be clear when ILECs are required to provide EELs. In the absence of clear rules as to when EELs must be made available, ILECs would be able to (and have been able to) simply reject the order for EEL conversion as not required. Such a refusal is not deemed by the self-reporting ILEC as a failure to meet the standard and so, no performance standard failure is reported. This amounts to a calculated gaming of the process, so as to stall the engine of competition. Other examples are readily available. If it is not clear that an ILEC cannot establish a separate inventory of UNEs for its own use and reject a CLEC order because there are "no facilities" available in the ILEC's "CLEC inventory," no performance metric on loop provisioning is meaningful. Both ILECs and CLECs must know the rules of the game so that performance can be measured and remedies can be applied when conduct fails to meet the performance metrics. The Commission must, therefore, recognize that it will have wasted its resources in developing a set of baseline performance metrics and remedies if it does not address those practices which ILECs use to inhibit or deny the use of UNEs.

In supporting the development of baseline standards, the 3CLECs do not suggest that one set of metrics and remedies fits all. As indicated, states must be in a position to adjust the metrics to deal with specific differences. An obvious difference recognized by the Commission and the Act in other circumstances is an exemption from the metrics for small ILECs, rural LECs, or those serving less than an aggregate of two percent (2%) of all access lines nationwide. For example, Section 251(f) exempts certain incumbent rural ILECs from certain stringent interconnection requirements, and provides for suspension or modification of those requirements for other incumbent groups with an aggregate of less than two percent (2%) of the nation's total

access lines. Because of their size and the nature of their operations, any attempt to impose, on a small or rural ILEC, performance standards applicable to a large ILEC having access to the latest technology and the capital to utilize it, would be inappropriate. In fact, with so many manual ordering and provisioning processes, many of the proposed Commission measures such as OSS Pre-order Interface Response Timeliness would be completely meaningless for smaller ILECs. In adopting performance metrics for UNEs, therefore, the Commission should expressly exempt from the specific performance requirements rural ILECs and ILECs serving less than an aggregate of two percent (2%) of all access lines nationwide. In those limited instances when CLECs provide service in areas served by these small or rural ILECs, the ILECs and CLECs can negotiate such standards, or the state commissions, on a case-by-case basis, should determine the appropriate performance standards.

Given the purpose of the metrics, it would be totally inappropriate to impose reporting requirements on CLECs. CLECs have neither market power nor the obligation to unbundle.

III. PERFORMANCE METRICS

The 3CLECs understand that members of the CLEC community have been working diligently to reach a consensus on specific performance metrics. The 3CLECs anticipate that they will support this effort. Any set of performance standards, to be meaningful, must address, in a realistic manner, certain key metrics, yet the Commission's initial list of potential metrics falls short in a number a critical areas. For example, while it is clear that the percentage of time performance will be part of any performance standards proposal, an ILEC's ability to meet the metric is obviously enhanced if the installation interval is extended to, for example, 10 to 14 days. Such a metric, however, is virtually meaningless from a real-world competitive point of view. Any industry or FCC adopted metric must be related to the competitive realities that, for a

CLEC to meet customer installation intervals, things such as UNE loops must be provided in three days under most circumstances. As such, as the Commission has previously recognized, when the conduct being measured exists both for the ILECs' provision of services for its own retail customers and for its provision of services to a CLEC, the metric must, at a minimum, be the same.[7] Similarly, when the ILEC provides the same services or functions to an ILEC affiliate, the minimum standard should be the ILECs' performance with its affiliate. In fact, one of the key benefits of performance standards is to allow for the ready comparison of ILEC performance in these circumstances.

Standards for performance for activities not comparable to the ILECs' provision of services to its own retail customers must be established recognizing the significance of a failure to meet the standard on a CLEC's customer and a CLEC's business reputation. Perhaps the most damaging issues involve those practices which relate to the initiation of competitive services to a former ILEC customer. Premature disconnection of the customer's service by the ILEC, failure to coordinate hot cuts, and failure to meet promised order completion dates all have a direct and negative impact on the customer's perception of the CLEC's capabilities and its reputation. These matters, which are wholly in the hands of the ILEC, have the capacity of dissuading a customer to maintain CLEC service and/or negatively colors the customer relationship at its outset and, therefore, any meaningful performance measures should include a metric on premature disconnections.

Once past initial installation, there are still myriad ways in which the ILEC can impair a CLEC's ability to provide quality service. For example, in any performance metrics, the time it

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[7] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96-182, ¶49 (rel. Apr. 19, 1996).

takes to reach the appropriate ILEC personnel to address trouble situations must be addressed. A number of the SBC-Ameritech region states have metrics that measure the responsiveness of such CLEC support centers -- the Local Operations Center, the Local Services Center, and the Hi-Cap Center.[8] Again, at a minimum, the time should be comparable to that for an ILEC's customers within an ILEC's own organization or that experienced by an affiliate. This means streamlining the reporting and escalation process. The ILECs must also react in a more timely manner to repair outages and serious service disruptions. In the real world, four to six to eight hour outages are unacceptable. The ILECs must provide the same level of service to CLECs as to their own retail customers.

Another area having a direct impact on the CLECs' ability to compete is the consistent problems associated with the ILECs' billing errors. These errors are costly, and entail the expenditure of enormous amounts of human resources. In addition, they frequently prevent the CLECs from receiving amounts due them from the ILECs or cause the CLECs to pay monies that are not owed and then wait months for credits or reimbursements. In today's economic climate, effectively reducing a CLEC's access to revenues or capital is an effective anticompetitive practice.

A number of performance metrics have historically been the subject of negotiation between ILECs and CLECs, the results of which are contained in interconnection agreements. In establishing baseline performance standards, the FCC should, in no way, interfere with the

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[8] *See, e.g.*, *Application by SBC Communications Inc. et. al. pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, 15 FCC Rcd 18354, para. 49 (2000); *Joint Application by SBC Communications Inc. et. al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri* 25 CR 183, para. 128 (rel. Nov. 16, 2001). The performance metrics adopted by SBC include measurements that relate to the responsiveness of CLEC support centers in Arkansas, Missouri and Texas, as well as in other states in which it operates.

ILECs' and CLECs' ability to negotiate these issues pursuant to Section 252 of the Act. The FCC's baseline standards can be viewed as levels that the CLECs can, at a minimum, expect to obtain from the ILECs in terms of response, maintenance, repair, and compensation. To this extent then, the FCC's metrics should serve as a strong guidance to state commissions in the context of arbitrating performance standards in the absence of state-crafted performance plans.

While the Section 252 process of negotiation and arbitration should be available to parties who seek to depart from the FCC's minimum standards, the Commission may wish to consider ways in which it can address issues that arise from the application of the standards in specific circumstances, as well as the need to make adjustments to or changes in the standards. Given the resource commitments necessary to adopt minimum standards, something well short of a formal rulemaking would be desirable. The Commission's proposal to consider various approaches taken by the states, such as the use of informal workshops chaired by Commission personnel should be further developed. Clearly, if workshops are to be utilized, they must be structured in ways to avoid delay. Accordingly, any use of workshops should only occur after a set of baseline metrics has been adopted. These workshops could help clarify business rules and resolve certain disputes, but should not delay the commencement of a baseline performance metric system. Given the extensive resources devoted to the development and modification of metrics by the states, one approach to revising metrics would be for the Commission, from time to time, to review the changes in performance metrics adopted by the state commissions.

IV. REMEDIES

As discussed, the FCC will have wasted its time and resources, as well as those of the industry, if, as part of establishing performance metrics for UNEs , it does not include remedies that are meaningful and largely self-effectuating. Remedies must be designed to change the

present economic incentives that ILECs have to inhibit competition in order to protect their market stranglehold. To do that, remedies must be swift and, to the extent possible, eliminate the profit from limiting competition. The Commission should recognize that the 3CLECs are not interested in creating a new revenue stream derived from ILEC payments for poor performance. What the 3CLECs want is for the ILECs to **have an incentive** to provide good service which will foster true competition in the marketplace. The FCC performance metrics must, therefore, include enforcement mechanisms intended to both deter discriminatory behavior and compensate CLECs for damages that result from failure to comply with the metrics.

In order to accomplish this result, the Commission's metrics must be linked to the imposition of meaningful penalties imposed by the Commission and means of compensating the CLECs for poor service by the ILEC. If the Commission makes clear that it will exercise its authority to impose forfeitures to the full extent of its statutory authority[9] to back up its performance metrics, this assurance alone should have a deterrent effect and should incent the ILECs to provide good service. In addition to the deterrent effect resulting from a policy of quickly and effectively levying forfeitures at the maximum level, the Commission must require the ILECs to include, in their tariffs for services to the CLECs and in their interconnection agreements, a provision for liquidated damages, to the CLECs, in the event of a failure to meet performance metrics. Without a liquidated damages provision, the CLECs will not be compensated for damages arising out of the ILECs' poor performance and the ILECs will not have any real incentive to provide good service to the CLECs. The amount of the damages can be set relative to the importance of the metrics to a CLEC's ability to compete, and the damages

[9] As adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996, 28 U.S.C. 2461, Section 503(b)(2)(B) provides for forfeiture penalties of up to $120,000 per violation or each day of a continuing violation, with a maximum of $1,200,000 for any single act or failure to act.

would be triggered by failure of an ILEC to meet the criteria by some specified percentage of times within a given period.

As an additional deterrent and method of compensation, the Commission should ensure that CLECs would be able to receive prompt consideration and disposition of any formal complaint filed under Section 208 relating to ILEC compliance with Commission metrics. The Commission could provide that complaints based upon an ILEC's failure to meet the Commission's performance metrics would automatically be treated pursuant to the Commission's "rocket docket" procedures. An ILEC's reporting of its failure to meet the metrics would serve as *prima facie* evidence of a violation in such a proceeding.

At bottom, the Commission's performance metrics for provisioning UNEs must include substantial, clear, economic consequences for failure to meet the standards. The Commission should use the full panoply of remedies available to it in order to give meaning to this exercise. The Commission's remedies should supplement those already provided for by various state plans. This coordinated effort is most likely to provide the necessary incentives to change the ILECs' behavior.

V. IMPLEMENTATION

The Commission must include in its rules provisions detailing the way in which performance measurements must be made. The ILECs should be required to maintain all records relating to such measures in secure, stable, and auditable files. The information should be developed so that the relevant governmental agencies and competitors can readily determine both whether the ILECs' performance in providing UNEs to CLECs is at least comparable to the ILECs' performance for its own retail customers or affiliates and whether an ILEC has, in fact,

met the standards established or triggered the appropriate remedy. The information should also be disaggregated in an appropriate geographic manner and filed on a monthly basis.

Since the entire system of measurement and reporting is dependent upon self-reporting by an ILEC, it is also essential that the Commission require the ILECs to engage independent auditors, at their expense, to annually audit an ILEC's records to ensure their accuracy. The CLECs should also be entitled to engage independent auditors to review these records on a showing that there is cause to doubt the accuracy of the records. In the event such an audit reveals material inaccuracies, the cost of the audit should be imposed on that ILEC.

VI. CONCLUSION

The FCC should adopt a set of baseline performance standards and measurements for the provision of UNEs and Interconnection Trunks from the ILECs to the CLECs. To be effective, these standards must be directly linked to self-effectuating, meaningful penalties and damages to compensate the CLECs for an ILEC's failures. In order to change the conduct of many ILECs that have an economic incentive to impose barriers to competition, the Commission's penalties and the damages provisions must not be such that they simply become a cost of doing business to an ILEC.

In adopting these standards, the Commission should expressly recognize the continued right of individual ILECs and CLECs to negotiate standards under Section 252. Additionally, Commission action should not undermine the tireless work and extensive knowledge of state commissions by preempting state plans that are already in place or forestalling current state activities to create performance plans. Baseline standards should simply be used to fill gaps in the current system and set benchmarks for use in enforcement actions. The Commission should also leave to the states the development of standards in those circumstances where an ILEC is a

small or rural ILEC or serves an aggregate of less than two percent (2%) of all access lines nationwide.

Specific standards, measurements, and remedies can only operate if all parties understand the rules relating to the ILECs' obligations to provide UNEs to the CLECs. To the extent those rules are not clear, the Commission must address those concerns.

Respectfully submitted,

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